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**1992 Wis Eth Bd 23**  
IMPROPER USE OF OFFICE;  
LEGISLATORS; SOLICITATION

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- a. A legislator should not solicit or accept contributions from any organization that employs a lobbyist.
- b. A legislator should not solicit or accept contributions of legal services or money to pay for legal services if the contributions could reasonably be expected to influence the legislator's judgment or actions or be considered a reward for past action.
- c. A legislator should not accept legal services or contributions to defray the legislator's legal expenses unless the legislator can demonstrate, clearly and convincingly, that the contribution is made primarily for a reason that is independent of holding a public office.
- d. A legislator may, consistent with the statutes the Ethics Board administers, solicit contributions permitted and reported under §11.23 and even use the title and prestige of office to do that. However, a legislator may not both use public position to solicit contributions to an individual or group under §11.23 and then permit the group to pay for legal costs the legislator incurs; to do so would be to use your official position to solicit a private benefit. OEB 92-23

June 16, 1992

Facts

[1] This opinion is based upon these understandings:

- a. You are a legislator and a state public official.
- b. You want to become a plaintiff in a lawsuit against the Legislature in regard to the wording of a recently enacted referendum.
- c. You have obtained a lawyer to represent you in the lawsuit.
- d. You would like to solicit organizations for donations to cover the legal costs of the lawsuit.
- e. Payments from such organizations would be made directly to the lawyer representing you.
- f. Some of the organizations you may solicit may be lobbying principals.
- g. Alternatively, you are thinking of forming an organization to be a plaintiff and solicit financing for the lawsuit.

- h. Alternatively, you are thinking of forming a group under §11.23, *Wisconsin Statutes*, for the purpose of soliciting contributions to finance a lawsuit.

### Question

[2] The Ethics Board understands your questions to be:

1. Consistent with the laws administered by the Ethics Board, may you solicit and may your lawyer accept contributions from organizations to cover the costs of pursuing the lawsuit?
2. What restrictions, if any, apply to your forming an organization to pursue the litigation and solicit financing for it?
3. What restrictions, if any, apply to your forming a group under §11.23 for soliciting contributions for a lawsuit?

### Discussion

[3] There are a number of provisions in the statutes administered by the Ethics Board that are pertinent to analyzing the issues you have raised. We do not have sufficient facts to give completely definitive answers to your questions. However, this opinion will discuss the relevant factors you should consider in deciding upon a course of action.

[4] Contributions from organizations employing a lobbyist

Wisconsin's lobbying law, Chapter 13, subchapter III, *Wisconsin Statutes*, prohibits elected state officials from soliciting or accepting anything of pecuniary value from a lobbyist or an organization that employs a lobbyist except in limited circumstances not pertinent here.<sup>1</sup> This restriction plainly encompasses soliciting or accepting money for attorneys' fees. Moreover, this restriction applies regardless of whether a solicitation or contribution is made independently of an official's holding public office.

[5] Influencing judgment

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<sup>1</sup> §13.625(3), *Wisconsin Statutes*, provides:

**13.625(3)** No candidate for an elective state office, elective state official, agency official or legislative employe of the state may solicit or accept anything of pecuniary value from a lobbyist or principal, except as permitted under subs. (1)(b)3 and (c), (2), (5), (6), (7), (8) and (9). No personal campaign committee of a candidate for state office may accept anything of pecuniary value from a lobbyist or principal, except as permitted for such a candidate under subs. (1) (b) 3 and (c), (2) and (6).

Wisconsin's Code of Ethics for Public Officials and Employees, at §19.45(3), *Wisconsin Statutes*, provides that no state public official may solicit or accept from any person anything of value<sup>1</sup> if it could reasonably be expected to influence the official's vote, official actions or judgment or could reasonably be considered a reward for past official action.<sup>2</sup> We do not know enough about the potential sources from which you might seek legal fees to advise whether a solicitation or acceptance would violate this section. In general, the Ethics Board has advised that officials not solicit or accept anything of more than nominal value from organizations that have or are reasonably likely to have issues before an official's agency in circumstances in which that agency has authority to decide those issues or to regulate the organization's conduct. And a legislator should not solicit anything of more than nominal value from an individual or organization that has a special or specific interest in an item or matter likely to be before the legislature.

[6]    Use of office for private benefit

The next section of the Ethics Code that is pertinent to your inquiry is §19.45(2), *Wisconsin Statutes*.<sup>3</sup> That section, reduced to its elements, provides:

No state public official  
May use his or her public position

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<sup>1</sup> §19.42(1), *Wisconsin Statutes*, defines "anything of value" to mean:

any money or property, favor, service, payment, advance, forbearance, loan, or promise of future employment, but does not include compensation and expenses paid by the state, fees and expenses which are permitted and reported under s. 19.56, political contributions which are reported under ch. 11, or hospitality extended for a purpose unrelated to state business by a person other than an organization.

<sup>2</sup> §19.45(3), *Wisconsin Statutes*, provides:

**19.45 Standards of conduct; state public officials.**

(3) No person may offer or give to a state public official, directly or indirectly, and no state public official may solicit or accept from any person, directly or indirectly, anything of value if it could reasonably be expected to influence the state public official's vote, official actions or judgment, or could reasonably be considered as a reward for any official action or inaction on the part of the state public official. This subsection does not prohibit a state public official from engaging in outside employment.

<sup>3</sup> §19.45(2), *Wisconsin Statutes*, provides:

**19.45 Standards of conduct; state public officials.** (2) No state public official may use his or her public position or office to obtain financial gain or anything of substantial value for the private benefit of himself or herself or his or her immediate family, or for an organization with which he or she is associated. This subsection does not prohibit a state public official from using the title or prestige of his or her office to obtain contributions permitted and reported as required by ch. 11.

To obtain financial gain or anything of substantial value  
For private benefit.

[7] You are a state public official and the provision of legal services or the payment of legal fees clearly is something of substantial value.<sup>4</sup> It does not matter that the contributions might go directly to your attorney since you still would be the direct beneficiary of those contributions to the extent that they facilitate your ability to pursue the litigation. Thus, you may not solicit or accept legal services, or money to pay legal fees, if you use your office or position to do so in circumstances in which you will receive a private benefit.

[8] The Ethics Board has long interpreted the prohibition on "use of office" to include an official's use of the title or prestige of office to obtain items of value.<sup>5</sup> The critical question is whether a party is providing legal services or money for legal fees primarily for a reason independent of your holding public office. That is, would a party be providing you the money or services if you were not a legislator. You have not provided us with sufficient facts to permit us to definitively answer this question. In examining the situation, the Ethics Board would examine such factors as whether you have a relationship to the potential donor independent of holding public office, whether the donor has displayed a prior interest in the issues involved in the proposed litigation, and whether the donor has a history of providing similar services or funds to non-officials. If your standing in the lawsuit is dependent on your position as a legislator, then, *a fortiori*, the provision of legal services or payment of legal fees is not independent of your holding public office.

[9] Further, it is clear that legal services provided to you as a litigant, or the payment of a monetary obligation you owe an attorney, is something of value from which you personally and directly benefit. The fact that you are not seeking monetary damages from the lawsuit and believe the lawsuit serves the interests of your constituents does not permit you to use your office to obtain legal fees or services. In an analogous context, the Ethics Board has stated that participation as a litigant in a lawsuit is not normally part of the official function or duties of a legislator.<sup>6</sup> Election to the legislature

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<sup>4</sup> Substantial value is more than nominal or token value. 11 Op. Eth. Bd. 1 (1989); 5 Op. Eth. Bd. 107 (1982).

<sup>5</sup> 12 Op. Eth. Bd. 5 (1990); 10 Op. Eth. Bd. 47 (1988), 43 (1987); 9 Op. Eth. Bd. 45, 46 (1987), 21, 22 (1986); 8 Op. Eth. Bd. 61 (1985); 7 Op. Eth. Bd. 22 (1983); 5 Op. Eth. Bd. 98 (1982), 57 (1981); 4 Op. Eth. Bd. 63, 46 (1980); 3 Op. Eth. Bd. 54 (1979).

<sup>6</sup> See 12 Op. Eth. Bd. 1 (1990). In that opinion, the Ethics Board was asked whether a legislator could use the resources of office in connection with the prosecution of a lawsuit. The Board recognized that Wisconsin law establishes that state funds and resources may only be used for public purpose of statewide concern, rather than for a private purpose. See, e.g., *Wisconsin Solid Waste Recycling Authority v. Earl*, 70 Wis. 2d 464 (1975); *State Ex Rel Wisconsin Development Authority v. Dammann*, 228 Wis. 147 (1938); 72 OAG 172 (1983); 66 OAG 43 (1977). The Ethics Board applied the test whether the expenses arise independently of official functions or because of them. 9 Op. Eth. Bd. 1, 2 (1985); 5 Op. Eth. Bd. 49 (1981). The Board determined that use of state resources in connection with legal representation of a private party in a lawsuit is not a public purpose and is

simply does not give a blanket commission to participate in lawsuits as a part of holding office.<sup>7</sup> In contrast, a legislator generally would be free to attempt to persuade another party to participate in litigation as long as the legislator has no pecuniary interest in the litigation's outcome.[10] Solicitation of contributions for an organization

You also have asked whether there are any restrictions on your forming an organization to bring the lawsuit and to solicit contributions. There are none. However, §19.45(2) prohibits your use of office to solicit items of substantial value not only for your private benefit but also for the benefit of organizations with which you are associated. This would include any organization of which you are an authorized representative or agent. Moreover, should you decide to participate as a party in the lawsuit with an organization, you should bear your own legal expenses unless otherwise permissible pursuant to the preceding analysis.

[11] Formation of a group under §11.23, *Wisconsin Statutes*

Finally, you have asked whether you may form a group under §11.23, *Wisconsin Statutes*, to solicit contributions for bringing the lawsuit. That section of the campaign financing laws provides that an individual or group, upon proper registration with the Elections Board, may receive contributions and make disbursements for the purpose of promoting or opposing referenda. Whether contributions to such a group may be used for litigation is a question for the Elections Board. Laws administered by the Ethics Board do not restrict your formation of such a group. Moreover, you may solicit contributions for the group, as long as you do not solicit contributions from lobbyists or lobbying principals, even if you use your public position to do so. However, if you use your public position to solicit contributions for §11.23 purposes you should not be a party in a lawsuit in which those solicited funds are used to defray your litigation expenses.<sup>8</sup> Conversely, as long as you

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prohibited by the Ethics Code. See *State ex rel. Bowman v. Barczak*, 34 Wis. 2d 57 (1967) (factors to be considered in determining whether an activity is for public purpose are the course or usage of government, whether the object is one for which taxes have been customarily levied, and whether the objects and purposes have been considered necessary for government support). See also 66 OAG 43, 47, *supra* (incidental benefits to the public which result from the promotion of private interests cannot justify the expenditure of public funds).

<sup>7</sup> The Ethics Board understands that at times the legislature as an institution is involved in litigation and that state funds may be used to fund that litigation. The distinction in such a case is that the determination to participate in such litigation is one made by the legislature in the normal course of exercising its authority.

<sup>8</sup> §19.45 prohibits your use of office to obtain "financial gain or anything of substantial value." The definition of "anything of value," at §19.42(1), *Wisconsin Statutes*, excludes "political contributions which are reported under ch. 11." Thus, you may use your office to solicit contributions under §11.23. However, if those funds are then used to finance *your* participation in a lawsuit, you would have used your office for financial gain. The Ethics Code recognizes the distinction between receipt of political contributions and putting them to personal use in §19.56(3)(d), *Wisconsin Statutes*, which provides that, notwithstanding §19.45:

neither use your public position to solicit contributions under §11.23 nor to solicit funds from the group, you may be the recipient of the group's funding your litigation.

### Advice

[12] The Ethics Board advises that:

- a. You should not solicit or accept contributions from any organization that employs a lobbyist.
- b. You should not solicit or accept contributions of legal services or money to pay for legal services if the contributions could reasonably be expected to influence your judgment or actions or be considered a reward for past action.
- c. You should not accept legal services or contributions to defray your legal expenses unless you can demonstrate, clearly and convincingly, that the contribution is made primarily for a reason that is independent of your holding a public office.
- d. You may, consistent with the statutes the Ethics Board administers, solicit contributions permitted and reported under §11.23 and even use the title and prestige of your office to do that. However, you may not both use your public position to solicit contributions to an individual or group under §11.23 and then permit the group to pay for legal costs you incur; to do so would be to use your official position to solicit a private benefit for yourself.

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A state public official may receive and retain from a *political committee* under ch. 11 transportation, lodging, meals, food or beverage, or reimbursement therefor or payment or reimbursement of costs permitted and reported in accordance with ch. 11.

(Emphasis added). A "political committee" is specifically defined to exclude a "group" formed under §11.23.